SUPREME COURT, U. S.

No. 75-1033

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MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNEST FAIRCHILD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinion below	2
Jurisdiction	2
Question Presented for Review	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	9
Appendices:	
A—Opinion of the Court of Appeals for the Seventh Circuit	App. 1
B—Opinion and Judgment of the Court of Appeals for the Seventh Circuit	App. 8
C—Order denying Petition for Rehearing	App. 9

AUTHORITIES CITED

Cases

Beck v. Ohio, 379 U.S. 89 (1964)	5
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	4
Johnson v. United States, 333 U.S. 10 (1948)	5
Katz v. United States, 389 U.S. 347 (1967)	7
Terry v. Ohio, 392 U.S. 1 (1968)	6
United States v. United States District Court, 407 U.S. 297 (1971)	6
United States v. Watson, 504 F. 2d 849 (1974)	4
Wong Sun v. United States, 371 U.S. 471 (1962)	5

Other Authority

Fourth Amendment to United States Constitution	*passim*

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court:

Petitioner, Ernest Fairchild, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on November 25, 1975.

(a) OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported at the date of the preparation of this Petition. It is reprinted in the Appendix attached hereto, App. p. 1 infra.

(b) JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, was entered on November 25, 1975. (Appendix B, infra) Petition for Rehearing was denied on December 23, 1975. (Appendix C, infra)

The jurisdiction of this Court is invoked under 28 United States Code § 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Is a warrant required prior to an arrest when no exigent circumstances exist for a warrantless arrest and there is abundant time to obtain a warrant?

CONSTITUTIONAL PROVISION INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was arrested without a warrant on November 24, 1972. A two-count indictment was returned on July 25, 1974 charging him with (1) selling seventy counterfeit $10 Federal Reserve Notes on or about November 8, 1972, and (2) passing an additional counterfeit $10 Federal Reserve Note on or about November 13, 1972, in violation of 18 United States Code §§ 473 and 472, respectively. After a jury trial, petitioner was convicted on both counts. He was sentenced to concurrent three year terms of incarceration on each count.

Prior to trial, petitioner filed a motion to suppress evidence which had been seized at the time of his arrest. An evidentiary hearing was conducted which revealed that petitioner was arrested without a warrant on November 24, 1972, although all of the information upon which his arrest was predicated was in the possession of United States Secret Service Agents by, at the latest, November 21, 1972. (Tr. 52) The trial court found "that everything that was known to justify the arrest of the defendant on the 24th was also known on the 21st. . . ." (Tr. 53) The District Court summarized the issue before it as:

> "The issue is, once you determine you have probable cause and you have plenty of time to get a warrant, should you make a probable cause arrest without one or should you get one." (Tr. 60)

The motion to suppress was denied and the items seized at the time of petitioner's arrest were subsequently introduced into evidence at trial.

REASONS FOR GRANTING THE WRIT

I.

THE JUDGMENT OF THE SEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN UNITED STATES v. WATSON, 504 F. 2d 849 (1974), cert. granted 420 U.S. 924 (1975). REVIEW BY THIS COURT IS WARRANTED TO RESOLVE THE CONFLICTING DECISIONS.

The fundamental question presented by this case is whether a warrant must be obtained prior to arrest where there is adequate opportunity to obtain a warrant and an absence of exigent circumstances excusing its procurement. Contrary to the decision below, that question has been answered in the affirmative by the Ninth Circuit in *United States* v. *Watson*, 504 F. 2d 849 (1974), cert. granted 420 U.S. 924 (1975). There, the Court held that a warrantless arrest six (6) days after the arresting officer had probable cause to arrest the defendant was unreasonable and in violation of the Fourth Amendment. Relying on *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), a majority of the Court concluded that an arrest warrant is required in the absence of exigent circumstances. No exigent circumstances having been shown, and no explanation for the failure to present the question of probable cause to a magistrate having been made—the arrest was found to be unlawful. The correctness of that decision presently awaits a definitive ruling by this Court. If the Ninth Circuit's decision is affirmed, the judgment below must be reversed.

BLEED THROUGH

II.

WARRANTLESS ARRESTS, LIKE WARRANTLESS SEARCHES, SHOULD BE TREATED AS PRESUMPTIVELY IN VIOLATION OF THE FOURTH AMENDMENT.

The principle that warrantless probable cause arrests are unlawful when there is adequate opportunity to obtain a warrant finds support in the pronouncements of this Court. The purpose of the Fourth Amendment warrant requirement was aptly summarized by this Court in *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only to the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

The preference for use of an arrest warrant was articulated in *Beck* v. *Ohio,* 379 U.S. 89 (1964). See also *Wong Sun* v. *United States,* 371 U.S. 471, 497 (1962) (J. Douglas concurring). And this Court has consistently interpreted the Fourth Amendment to require that the issue of probable cause be submitted to a neutral and detached magis-

trate whenever possible. *United States* v. *United States District Court,* 407 U.S. 297, 315-18 (1971); *Terry* v. *Ohio,* 392 U.S. 1, 20-22 (1968).

Moreover, sound reasons exist for holding that a warrant must be obtained prior to arrest where there is adequate opportunity to obtain one and a lack of necessity for swift action without prior judicial approval. The Fourth Amendment to the United States Constitution itself expressly protects against unreasonable searches and seizures of the "person" as well as of "houses, papers and effects." It applies with equal force to the arrest of an individual as to the search and seizure of his property.

Of course, the central inquiry, whenever, as here, a Fourth Amendment violation is alleged, is the reasonableness under all of the circumstances of the particular governmental invasion of a citizen's personal security that is involved. There is no definitive formula for the determination of reasonableness under the Fourth Amendment. Reasonableness varies with the subject matter and the circumstances. The facts of each case control the determination.

In assessing reasonableness, it is necessary to focus upon (1) the governmental interest which allegedly justifies the specific official intrusion and (2) the interest of the private citizen sought to be intruded upon. By balancing the need to search or seize against the invasion which the search or seizure entails—a determination of reasonableness may be had.

The ability to arrest upon probable cause without first securing a warrant must arise, if at all, from the necessity to protect the legitimate interests of law enforcement. Obviously, effective law enforcement demands prompt and

BLEED THROUGH

swift action at times. An intolerable handicap for legitimate law enforcement efforts might result if warrants were required for every arrest. Consequently, in an emergency situation, where time is of the essence, an arrest on probable cause is and should be viewed as constitutionally reasonable, even in the absence of a warrant.

The unique facts of this case clearly demonstrate, however, there was no emergency or other legitimate law enforcement concern for prompt action. To the contrary, no "exceptional circumstances" are cited which might have justified the warrantless arrest. No evidence or contraband was threatened with removal or destruction. It does not appear that the petitioner was fleeing or likely to take flight. Nor does it appear that there was apparent danger to any officer or other person which required that the arrest proceed without first awaiting acquisition of a warrant. Except for the inconvenience to the officers in preparing the necessary papers and presenting the evidence to a magistrate, no reason is suggested for not obtaining a warrant issued by a detached and neutral magistrate prior to petitioner's arrest.

Balanced against the governmental interest in effective law enforcement is the individual's interest in his personal privacy. An individual's right to personal privacy should be accorded the same protection that is given to an individual's dwelling or effects. The notion that the places and things protected under the Fourth Amendment receive that protection only as a logical extension of the protection accorded to the individual was underscored in *Katz* v. *United States,* 389 U.S. 347 (1967). It was there recognized that the ultimate privacy to be protected by the Fourth Amendment is that of the person. Consequently, one's

personal liberty should be accorded the same protection under the Fourth Amendment as the ownership and possession of property now enjoy.

In the absence of exigent circumstances, an arrest should be made only with a warrant issued by a magistrate on a showing of probable cause, supported by oath or affirmation, as required by the Fourth Amendment. Apart from those cases where the offense is committed in the presence of the officer or where exceptional circumstances excuse the requirement of a warrant, arrests without warrants, like searches without warrants, should be the exception, not the rule in our society. Implicit in the Fourth Amendment's protection against unreasonable searches and seizures is its recognition of an individual's right to personal privacy and freedom of movement. To sanction a procedure which allows police to arrest at their discretion without the prior assessment of probable cause by a neutral and detached magistrate—even though the opportunity for such a magistrate's determination is clearly present—undermines the purpose of the Fourth Amendment and the protection it affords.

The facts of this case clearly indicate that the arresting agents had probable cause to arrest petitioner for the offense on which he was ultimately arrested at least three (3) days prior to his arrest, but at no time attempted to obtain prior judicial approval for that arrest. No facts were produced to demonstrate that a warrant could not have easily been obtained during the three day delay. To the contrary, the testimony at the suppression hearing indicated that every opportunity existed to obtain an arrest warrant. Where there is relative ease in obtaining a warrant and adequate opportunity to do so, and a lack of any necessity for swift action without prior judicial approval,

BLEED THROUGH

it is unreasonable not to require that the determination of probable cause be submitted to a disinterested magistrate prior to arrest. Accordingly, it was error for the trial court to have denied petitioner's motion to suppress evidence, and the judgment of the Seventh Circuit Court of Appeals affirming that denial should be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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